No. 16361

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALFONSO ESPINOZA COVARRUBIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

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I.

Jurisdictional Statement.

An Indictment was returned by the Federal Grand Jury for the Southern Division of the Southern District of California while sitting at San Diego, charging the defendant and another with a violation of Title 21, United States Code, Section 176(a). This Indictment was filed with the District Court on May 8, 1958. [Clk. Tr. pp. 2-3.]

Jurisdiction of the District Court is found in Section 3231 of Title 18, United States Code. Thereafter, trial by jury was had and a verdict of guilty returned on July 30, 1958. Immediately after return of the verdict the defendant was committed to the custody of the Attorney General for a period of five years. [Clk. Tr. pp. 11-13.]

On August 4, 1958, within five days of the conviction (Fed. Rules Crim. Proc., Rule 33) defendant moved the Court for acquittal and a new trial. [Clk. Tr. p. 14.] On August 18, 1958, defendant's Motion for Acquittal and a New Trial was denied [Rep. Tr. pp. 10-11]—however, a formal order was not entered until September 11, 1958. [Clk. Tr. p. 18.] On August 25, 1958, within ten days of the Court's denial of his motion for acquittal and a new trial, defendant filed a notice of appeal from the judgment of conviction and denial of his Motion for Acquittal and a New Trial. [Clk. Tr. pp. 16-17.] This Honorable Court, therefore, has jurisdiction of the cause under the provisions of Rules 37(a)(2) and 39 of the Federal Rules of Criminal Procedure and Section 1291 of Title 28, United States Code.

II.

Statement of Facts.

On March 29, 1958, defendant entered the United States from Tijuana, Mexico, at the port of San Ysidro, California. He was driving a 1955 Buick automobile. [Rep. Tr. p. 6.] This vehicle is registered to the defendant and his wife. [Rep. Tr. p. 58.] Upon being interrogated the defendant stated that he was bringing no merchandise from Mexico. [Rep. Tr. p. 7.] After making this declaration the defendant was asked to open the trunk of the vehicle [Rep. Tr. p. 8] and the trunk was opened by the defendant with the use of a key which he produced. [Rep. Tr. p. 17.] The automobile was on a "look out list" [Rep. Tr. p. 11] which is in effect a request that certain specified vehicles be given a detailed search. [Rep. Tr. p. 14.] The defendant and the vehicle were, therefore, directed to a secondary inspection area. [Rep. Tr. p. 9.]

At this inspection area the spare tire was removed from the trunk of the automobile. [Rep. Tr. p. 23.] Subsequently four packages were removed from the spare tire and eventually found to contain approximately nine and one-half pounds of marihuana. [Rep. Tr. pp. 33-35, 40-41.] The only evidence offered on behalf of the defendant was his own testimony. [Rep. Tr. pp. 54-60.] The defendant denied knowing anything about the marihuana. On cross-examination he admitted that he had driven the vehicle to Mexico in the early morning hours of March 29, 1958. At no time did he testify that anyone other than himself drove the vehicle in Mexico.

III.

Specification of Errors.

Appellant has specified two errors:

1. The evidence of record is insufficient to support the verdict of guilty.

2. The Court erred in excluding evidence of a narcotics record of a third person.

IV.

Argument.

A. Evidence of Record Amply Supports the Verdict of the Jury Finding Defendant Guilty.

At the outset it should be noted the cases upon which appellant relies and those which will be cited by the appellee are concerned primarily with whether or not the evidence of record was sufficient to justify a finding that the defendant therein "possessed" narcotics. The instant case, however, is not one which presents simply a question of possession. (*Cf. Ketchum, et al. v. United States,* 259

F. 2d 434 (5th Cir., 1958).) We are here concerned with a case wherein a defendant is engaged in affirmative conduct with respect to the contraband. There is no question but that appellant physically imported marihuana into the United States from Mexico on March 29, 1958. The issue is whether the evidence of record is sufficient to support a finding that Mr. Covarrubias had knowledge of the marihuana in the trunk of his vehicle when he crossed the international boundary. As noted before, the cases generally speak in terms of "possession." Actually these decisions deal with the sufficiency of the evidence to establish knowledge of the presence of contraband. Knowledge of the presence of narcotics, like any other fact, may be proved by circumstantial evidence. (*Evans et al. v. United States,* 257 F. 2d 121, 128 (9th Cir., 1958).)

Turning now to the cases cited by appellant in his Brief, it is respectfully submitted that each of these authorities is easily distinguished from the facts involved in the instant appeal.

People v. Antista, 129 Cal. App. 2d 47, 276 P. 2d 177 (1954), involved a case where the defendant was not even present at the time officers entered his premises which at that time were occupied by his paramour and the other person. Marihuana was found in an unused room and in an ashtray, both places being readily accessible to the other persons present.

Guevara v. United States, 242 F. 2d 745 (5th Cir., 1957), was a case where a small amount of marihuana was found under the front seat of a vehicle in which the defendant and another person had been riding. The Appellate Court in holding the evidence insufficient noted

that the contraband was in a position such that either occupant could have placed the marihuana under the seat.

United States v. Tijerina, 138 Fed. Supp. 759 (D. C. Texas), involved a case where ¾ pound of marihuana was found concealed in the bumper of a vehicle occupied by three defendants.

It is patently obvious that the foregoing cases are easily distinguished from that involving Mr. Covarrubias where a large quantity of marihuana was found in the spare tire of his vehicle and the tire was contained in a locked trunk for which Mr. Covarrubias produced the key.

United States v. Maghinang, 111 Fed. Supp. 760 (D. C. Del.), involved a defendant who was driving a vehicle borrowed from another person, not one registered to himself. In the *Maghinang* case, as in other cases relied on by appellant, the contraband was secreted under the dashboard, a place easily accessible to persons other than the defendant and one to which access could be gained without a key.

On Way Jong v. United States, 245 F. 2d 392 (9th Cir., 1957), involved a case where the only evidence connecting the defendant with narcotics was that a co-defendant who was dealing with an undercover agent frequently contacted the defendant On Way Jong.

Rodrigues v. United States, 232 F. 2d 819 (5th Cir., 1956), also involved a situation in which marihuana was found on the defendant's premises but in a place readily accessible to others. Other evidentiary matters in the *Rodrigues* case obviously indicate that it is not in point.

The Court's attention is invited to the following authorities wherein verdicts of guilty were upheld and which

illustrate the correctness of the result reached in the trial of appellant.

Rosenberg, et al. v. United States, 13 F. 2d 369 (9th Cir., 1926);

Mullaney v. United States, 82 F. 2d 638 (9th Cir., 1936);

Borgfeldt v. United States, 67 F. 2d 967 (9th Cir., 1933);

United States v. Johnson, 260 F. 2d 508 (7th Cir., 1958);

Ketchum, et al. v. United States, supra;

Bellah v. United States, 256 F. 2d 958 (5th Cir., 1958).

It is submitted that the sufficiency of the evidence in the instant case is most accurately analyzed with reference to the recent decision of this Honorable Court in *Evans et al. v. United States, supra.* The opinion, although dealing with the question of possession, notes that knowledge of the presence of narcotics may be proved by circumstantial evidence and that exclusive access to the place in which the contraband is found gives rise to a permissive inference that the person having such exclusive access knew of the presence of the contraband. The opinion further notes that, absent a showing of exclusive access, additional circumstances must be proved to justify an inference of knowledge.

An examination of the record in the instant case is consistent with only one conclusion and that is that appellant Alfonso Covarrubias had exclusive access to the trunk of the vehicle where the marihuana was found. The record reflects that the trunk where the marihuana was contained was locked, and it was appellant who pro-

duced the key to this locked trunk. Appellant argues in effect that this conclusion is weakened by the fact Mrs. Covarrubias entered a plea of guilty to the charge. It should be noted that this was not a matter brought before the jury and appellant's wife was not called as a witness on his behalf. In any event the fact that another person may also be guilty of the offense in no way impinges upon appellant's guilt. The type of offense involved in the instant appeal is not one which is inconsistent with participation by more than one person.

See:

United States v. Cohen, 124 F. 2d 164 (2d Cir., 1941), cert. den. 315, 811;

Brown v. United States, 222 F. 2d 293 (9th Cir., 1955);

Henry v. United States, 215 F. 2d 639 (9th Cir., 1954).

It should be pointed out that the foregoing observation in no way weakens the argument of appellee concerning appellant's having exclusive access to the trunk. This is illustrated by the following hypothetical situation: If appellant's wife purchased the marihuana in Mexico and then delivered the contraband to appellant, who, in turn, placed it in the trunk of the vehicle to which he alone had a key, his exclusive access to the place where the contraband was found would support an inference of knowledge on his part under the *Evans* case, *supra,* even though his wife were, in fact, equally guilty of the smuggling venture.

Assuming *arguendo* that there was an insufficient showing of exclusive access to the trunk by appellant, it is submitted that additional circumstances present amply justified a conclusion that appellant knew of the mari-

huana contained in the trunk. The contraband was found in the spare tire of a vehicle registered to appellant, which he was driving and for which a lookout had been posted. There is no evidence that anyone other than appellant used the vehicle during the fifteen hours it was in Tijuana, Mexico, a place which this Honorable Court may judicially notice is a prime source for contraband which is smuggled into the United States. (See: *Blackford v. United States,* 247 F. 2d 745, 752 (9th Cir., 1957), cert, den. 356 U. S. 914; *Carroll v. United States,* 267 U. S. 132, 160.) These factors plus the very amount of contraband involved, nine and one-half pounds of marihuana, amply supported a finding that appellant knew about the marihuana in the trunk of his car.

B. No Error Resulted From the Trial Court's Exclusion of Evidence Concerning the Narcotics Record of a Third Person.

Counsel for Appellee has been unable to find authorities directly in point concerning admissibility of offenses or misconduct by third persons not directly involved in a criminal prosecution. Generally, this problem has arisen in homicide cases wherein motive of a third person or some relationship between the third person and the decedent might have been relevant. (See Wigmore on Evidence (3d Ed., 1940), Sec. 139, pp. 573, *et seq.;* 121 A. L. R. 1362.)

Even in this situation the decisions are not in accord as is illustrated by the foregoing citations. Those cases which have held such evidence relevant involve a fact situation wherein proof that someone other than the defendant was the killer necessarily precluded the defendant's guilt. As noted before, the type of offense involved in the instant appeal is consistent with participation by other

persons in addition to the defendant. (See *Henry v. United States, supra; United States v. Cohen, supra; Brown v. United States, supra.*)

Appellant relies primarily on the case of *People v. Antista, supra,* which discussed the sufficiency of the evidence against the defendant and in finding the record lacking noted that marihuana was found on the defendant's premises where a paramour who had a narcotics record was present at the time the contraband was discovered. In the instant case there is nothing to indicate that Appellant's brother-in-law, whose narcotics conviction Appellant wished to bring before the jury, was in any way involved in the trip to Mexico nor does the record indicate how long it had been since Mr. Covarrubias' brother-in-law used the automobile nor whether or not the brother-in-law had access to the trunk. At the time the Government's objection to the brother-in-law's narcotics record was sustained, the record was as follows:

> "Q. Mr. Covarrubias, on or about March 29th, 1958, did you knowingly smuggle marijuana into the United States? A. No.
>
> Q. And does anyone else have access and use your automobile? A. My wife.
>
> Q. Anyone other than your wife? A. A brother of my wife.
>
> Q. And is his name Fred Navarra? A. Yes.
>
> Q. And has he been convicted of possession of narcotics?
>
> Mr. Hughes: Objection, your Honor. That's immaterial.
>
> The Court: It will be sustained." [Rep. Tr. p. 54.]

Since at the time the question concerning Fred Navarra's narcotics record was put, there was nothing to indicate that he was in any way involved in Appellant's trip to Mexico, it is submitted that at least at that point in the record such inquiry was wholly irrelevant, Common sense compels that we reject any inference that the marihuana was placed in the trunk of the vehicle at some unknown previous date and innocently transported to Mexico on the early morning of March 29. The amount of marihuana involved and the fact Tijuana is a known source of marihuana in large quantities compels that any such line of reasoning be rejected. This being so, whether a third person who had "access" to Appellant's vehicle had been convicted of a narcotics offense in the past would be wholly irrelevant and immaterial.

Assuming *arguendo* that in restrospect it may be said that Fred Nevarra's narcotics record might have had some slight relevancy, it was to say the most extremely remote. Exclusion of such evidence is a matter for the trial judge's sound discretion and his decision should not be reversed, absent a clear abuse of such discretion.

> "The trial judge possess wide latitude in the determination of the relevancy or materiality of evidence and his ruling cannot be reversed in the absence of an abuse of discretion." (*Wilson v. United States,* 250 F. 2d 312, 325 (9th Cir., 1957).)
>
> *United States v. Socony-Vacuum Company,* 310 U. S. 150, 230 (1940), reh. den. 310 U. S. 658.

In light of the record at the time the question concerning Fred Nevarra's narcotics record was put, it is obvious that sustaining an objection to the relevancy of such inquiry would not constitute an abuse of discretion requiring reversal of the conviction.

V.

Conclusion.

For the foregoing reasons it is respectfully submitted that the finding of guilty in the Court below should be affirmed.

Respectfully submitted,

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